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## NOTICES OF NEW BOOKS.

The Practice of the Courts of Justice in England and the United States. By Conway Robinson, of Richmond, Va. Vol. I. Richmond: A. Morris. 1854.

The occasional exchange of "new lamps for old," however improper may have been the motives of the mythic originator of that practice, cannot be too much commended. It is especially important with regard to law books; of which, edition must constantly be replaced by edition, or else be left stranded and useless by the changing tide of jurisprudence. The demands of this unceasing progress are implacable; we must keep ourselves ever close upon the heels of the Atlanta of law. The patient accumulations of the past serve only as a foundation for the labors of the future. The lawyer piles case upon case, treatise upon treatise, Ossa upon Pelion, but the sky is never reached. Our libraries, in their tedious but unending growth, are like the coral formations of the Pacific, which, we are told, are the result of the vain efforts of despairing insects to keep at the surface of a sea, whose level is continually advancing. The law writer more emphatically feels the burthen of the task. There is, indeed, no breathing spell in the race between judges and authors—between case makers and case collectors. Pause we dare not—

"To have done, is to hang  
Quite out of fashion, like a rusty mail,  
In monumental mockery."

Mr. Robinson has more than satisfied the necessity which the lapse of twenty years since the publication of his book of practice has thus imposed upon him. He has given us not merely a new edition, but in reality a new book, upon a much enlarged plan, and with great additions and improvement. The work is now intended to be applicable, not merely to Virginia, but to the whole of the United States.

In this view, however, if we are to judge by the present volume, which is only the first instalment of a long series, and by the intimations of the preface, the title of the book is somewhat of a misnomer, and by no means does justice to the character of its contents. Reversing the plan of a modern prospectus, the promise falls greatly short of the performance.

<sup>1</sup> See Aladdin's case, stated 1 Arabian Nights, 500.

Now-a-days, when the air is hideous with the clangor of self-blown trumpets from every house-top and highway, the modest announcement even of a really good book like the present, is so rare, that its occurrence is quite a matter for gratitude. But we cannot think that this reticence is always as judicious as it is in good taste. "The world is governed by labels," was the induction of a veteran wine-drinker, from a wide experience; and the axiom is as true both as to books and bottles. A proper coinage stamp is a great help to ordinary people who have not the means of judging, off-hand, of the value of gold by its purity and weight. To drop metaphor, we doubt whether many, from Mr. Robinson's title-page, would guess the extent and importance of his plan. Books of practice, from such venerable relics as "Styles' Register," or "The Attorney's Guide," to the classic *Tidd*, or the microscopic *Archbold*, constitute a class whose peculiar function is well known. They are necessary nuisances, filled with the barren details of procedure, such as no lawyer cares to burthen his memory with, but to which, if he have a soul above judicial buttons, he turns with disgust. They are about as instructive reading as a cookery book, or a pharmacopeia. Dr. Paley used to illustrate his dislike to the over division of labor, by inquiring what sort of account a man who had spent his life in manufacturing heads of pins could render at the last; and in the same manner it would be worth considering what must be in the end the mental condition of a lawyer who has passed his days in the study of a book of practice. Now, Mr. Robinson's work is just the reverse of all this. His purpose appears to be the development of the common law, on its practical side, indeed, but still with a fullness and in a scientific mode of treatment, which have hitherto been employed only on its abstract or theoretical side. He gives not merely the intricate machinery of the various forms of action or remedies, but also the material upon which actions or remedies are employed, and its mode of preparation. It is the dynamics instead of the statics of jurisprudence; or, as when it is employed in the Arts, we speak of *applied* chemistry, so Mr. Robinson's idea seems to have been to furnish the profession with a treatise on *applied* law. The idea is original, and well carried out.

The first volume, which is the only one as yet published, is devoted to the consideration of "the place and time of a transaction or proceeding;" under which division the conflict of laws and the statute of limitations are chiefly treated of. Under the head of conflict of laws are considered the subjects of fugitives from justice and from slavery, of guardianship, and

the like; of contracts, of marriage and divorce, of property, of the estates of dececents, and of decrees and judicial acts; so far as all these are affected by that conflict; the mode in which foreign laws and the like are to be proved; war and alienage in their effect on person and property; the effect of the place of the proceeding upon the parties and procedure of a suit; the effect of a suit beyond the jurisdiction; and finally, the question as to the tribunal which is to be selected, and the extent of the jurisdiction of any special Court. Under the head of "Time of a transaction or proceeding" are considered, the effect of Sundays and holidays thereupon; the computation of time; and the time for bringing personal actions generally. Within the latter division, fall questions as to when an action can be brought for breach of contract, with relation to the time of performance; and finally, the broad subject of the statute of limitations.

We have not space to devote to even a general examination of the manner in which these subjects are discussed; but we may state, that it is done with great learning and ability, and with much copiousness of reference to cases, both the most recent and the most authoritative, in England and the United States. The authorities are not carelessly thrown together, as is too often the case at present, but are made the subject of comparison and comment in the spirit of free and independent inquiry. Among his criticisms we may mention one, upon a couple of Pennsylvania cases, which is worthy of attention here, though we are not altogether prepared to admit its validity. Mr. Robinson is discussing the question as to how far the statute of limitations applies as between the maker and endorser of a note, when the latter has been obliged to pay. He says: "In Pennsylvania the case has arisen, of an endorser of a note whose remedy to be reimbursed what he had paid in discharge of the note was barred if his only remedy was by an action on the note itself, but not barred if the law would raise an *assumpsit* by implication to redress him; and yet it has been gravely maintained that the law will not raise such an *assumpsit*, 'because there is no necessity for it?' 2 Whart. 358-9. The case is there put of an endorser who is unable to pay a note before the lapse of six years after it became payable, and then becoming able, is compelled to pay it under a judgment obtained against him in a suit commenced before the six years had run out; and under the rule which the Court is maintaining, he would be unable to maintain an action against the principal for the money paid. Seeing the injustice of this, the Court says, 'he may guard against it, if he will, by taking an indemnity under seal.' *Kennedy* vs.

*Carpenter*, 2 Whart. 359. This is now the acknowledged rule in Pennsylvania. An endorser of an accommodation note can there recover from the maker only on the contract of endorsement, and not on an implied *assumpsit* for money paid to his use within six years before suit brought. In the case of a note payable in 1833, and judgment thereon in 1836 against the endorser, who paid it in 1841, his action brought in 1843 was held to be barred. *Farmers' Bank vs. Gilson*, 6 Barr, 51."—1 ROBINSON'S PRACTICE, 295.

After mentioning similar decisions in New York, the author shows that it has been held that a part payment by the endorser would take the case out of the statute, and comments strongly on the inconsistency of the doctrine, which he considers, moreover, to be not in accordance with the English cases. Yet, however harsh the principle of *Kennedy vs. Carpenter* may seem at first sight, it really seems to us correct, both upon technical and substantial grounds. The reasoning of that case is that the law will not raise an implied *assumpsit*, even to indemnify a surety, where there is already an express contract, about which there can be no doubt; and therefore, as there is an express promise on the face of a note, to pay the endorser, that he can sue only thereupon, and within the period of the original limitation. The English cases cited by Mr. Robinson, are those of accommodation *acceptors*, which depend upon the opposite principle; for there is no express promise by the drawer to pay the acceptor of a bill, and therefore, in the case of an accommodation acceptance the undertaking to indemnify must be raised by the law, on which, according to the general rule, well stated by Mr. Robinson, there is no right of action till the acceptor is obliged to pay. There is, to be sure, an inconsistency between the two classes of cases, starting as they do from different points; but that inconsistency can be no more objected, with justice, to the former than to the latter class. Nor do we find that the anomaly, that a part payment by the endorser takes the case out of the statute, while entire payment does not, really exists. For if the case of *Bullock vs. Campbell*, which is cited from 9th Gill, decides that an action for part payment by an endorser *within* the six years, starts the statute afresh, that is nothing more than the ordinary rule on the subject; and it might just as well be urged against that as an inconsistency, that if a debtor pays none of the debt *within* the period of limitation he is protected, while if he pays part he is still liable. But if the case referred to decides that an action can thus be brought *after* the six years, then all that need be said is, that it is not in accordance with the other authorities.

It must not be forgotten, moreover, that the statute is intended for the protection of the debtor, and is not to be moulded to suit the convenience or necessity of the creditor. That protection would be nugatory if the liability of the maker of a note were to continue till he was reached by the first of a long series of endorsers after consecutive litigations in which each man may have run to the end of his tether of limitation. In short, all the reasons upon which the statute is based, such as the destruction of receipts, the death of witnesses, the abandonment of securities, and a hundred others, apply just as strongly in favor of a maker, where there are twenty endorsers on a note, as where it still remains in the hands of the original payee. And, finally, the hardship of the endorser's case is not so very apparent when we consider, that as he must receive immediate notice of non-payment by the maker, he knows as soon as the *statute begins running*, that he is looked to by the holder, so that if he does not choose to take up the note, and turn round on the maker, within the period limited, the loss of his remedy over, is just as much the result of his own carelessness, as if the debt was primarily due to him. Whatever may be said, however, in justification of the decisions of Pennsylvania and New York on the subject, it cannot be denied that Mr. Robinson has stated ingenious and forcible objections to them, which will deserve the consideration of the bench in these States.

We have to say in conclusion, that we regard Mr. Robinson's book as an extremely valuable and important contribution to legal science. It might, perhaps, be suggested as a blemish upon the general execution of the work, that its analytical division or table of contents, is not plotted out with as much distinctness as could be desired, so that the connection of the different titles and chapters, and the method of transition from one branch of the subject to another, appear at first somewhat obscure. But this is a difficulty which, with a little consideration, is readily overcome, and where all else is so good, it would be ungracious to dwell upon what is really a very trifling defect, and one which will doubtless be hereafter amply supplied.